A

Cherian a/l KC George & Anor v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–69 OF 2011

RAUS SHARIF PCA, MOHD HISHAMUDIN AND ANANTHAM KASINATHER JJCA

24 FEBRUARY 2012

C

Criminal Procedure — Search — Search and seizure — Seizure of properties after investigation — Appellants applied for release of properties seized — Sessions court and High Court ordered forfeiture of properties seized — Appeal against order — Whether presumption under s 35 of the Dangerous Drugs (Forfeiture of Property) Act 1988 would apply to proceeding under s 32(3) — Dangerous Drugs (Forfeiture of Property) Act 1988 ss 32 & 35

D

E

Words and Phrases — Meaning of 'proceedings' — Dangerous Drugs (Forfeiture of Property) Act 1988 ss 32 & 35

F

The first appellant was arrested and detained under the Dangerous Drugs (Special Preventive Measures) Act 1985. The police carried out an investigation pertaining to this arrest. This investigation led to the properties of the first and second appellants, namely a sum of cash, monies kept in the bank, jewellery and two units of laptop, being seized by the police pursuant to s 25 of the Dangerous Drugs (Forfeiture of Property) Act 1988 (Act). The appellants applied under s 32(2) of the Act for the release of the properties seized. The DPP referred the appellants' claims to the sessions court. After hearing all the parties, the sessions court judge forfeited all the properties. The appellants appealed to the High Court. The High Court judge held that s 35 of the Act placed the burden on the appellants to prove that the properties were legally acquired by them and that they had failed to do so. The High Court thus allowed the appeal in part, in that, it ordered a return of the jewellery and personal belongings of the first appellant but ordered the cash and the monies kept in the bank to be forfeited. This was the appellants' appeal against that decision. The appellants submitted that the High Court judge had erred in applying the statutory presumption under s 35 of the Act to a proceeding under s 32(3) of the Act. It was the appellants' case that had the High Court judge accepted both the appellants' versions that the monies were acquired by them through the internet football betting and friendly loan activities, the properties seized would be returned to them. The prosecution submitted that s 35 of the

G

H

I

Act applied to the present case and that the test adopted by both the trial judge and the High Court judge was the correct approach.

Held, dismissing the appeal:

(1) A majority of the cases decided by the High Court have held that the presumption under s 35 of the Act was applicable to a proceeding under s 32 of the Act. This court shared the same view. The words 'any proceedings' in s 35 of the Act should be given the ordinary meaning that it covers all proceedings under the Act. To say that a proceeding under s 32(3) of the Act was not a proceeding envisaged under s 35 of the Act would be a clear violation of to the clear wording of s 35 of the Act. Thus in the instant case, s 35 places upon the appellants the burden to prove that the properties seized by the police were not illegal properties (see paras 14–15 & 21).

(2) After having perused through the records this court found that there was no credible evidence to back the appellants' claim. Thus the presumptions remained unrebutted and as found by the courts below the properties were presumed to be illegal and had been rightly forfeited by the Government of Malaysia (see paras 22–23).

[Bahasa Malaysia summary

Perayu pertama ditangkap dan ditahan di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985. Polis menjalankan siasatan berkaitan penahanan ini. Siasatan membawa kepada milikan-milikan perayu pertama dan kedua, iaitu sejumlah wang, wang yang disimpan di dalam bank, barang kemas dan dua unit komputer riba, dirampas oleh polis mengikut s 25 Akta Dadah Berbahaya (Pelucuthakan Harta) 1998 ('Akta'). Perayu-perayu memohon di bawah s 32(2) Akta untuk melepaskan milikan yang dirampas. Pihak pendakwaan ('PP') merujuk tuntutan-tuntutan perayu-perayu ke mahkamah sesyen. Selepas mendengar hujahan kesemua pihak, hakim mahkamah sesyen merampas milikan tersebut hartanah. Perayu-perayu merayu ke Mahkamah Tinggi. Hakim Mahkamah Tinggi memutuskan bahawa s 35 Akta meletakkan beban ke atas perayu-perayu untuk membuktikan bahawa milikan diperolehi secara sah oleh mereka dan bahawa mereka gagal berbuat sedemikian. Mahkamah Tinggi oleh itu membenarkan sebahagian rayuan, di mana ia memerintahkan pemulangan barangan kemas dan barang-barang peribadi perayu pertama tetapi memerintahkan wang tunai dan wang yang disimpan di dalam bank dirampas. Ini adalah rayuan perayu-perayu terhadap keputusan tersebut. Perayu-perayu berhujah bahawa hakim Mahkamah Tinggi tersilap dalam menggunapakai anggapan statutori di bawah s 35 Akta kepada prosiding di bawah s 32(3) Akta. Adalah kes perayu-perayu bahawa jika hakim Mahkamah Tinggi menerima kedua-dua versi perayu-perayu yang wang yang diperolehi oleh mereka melalui judi bolasepak internet dan aktiviti-aktiviti pinjaman peribadi, milikan-milikan

yang dirampas dipulangkan kepada mereka. Pihak pendakwaan berhujah bahawa s 35 Akta yang digunapakai kepada kes ini dan bahawa ujian yang digunakan oleh kedua-dua hakim perbicaraan dan hakim Mahkamah Tinggi adalah pendekatan yang betul.

Diputuskan, menolak rayuan:

(1) Majoriti kes-kes yang diputuskan oleh Mahkamah Tinggi telah memutuskan bahawa anggapan di bawah s 35 Akta digunapakai kepada prosiding di bawah s 32 Akta. Mahkamah ini kongsi pandangan yang sama. Perkataan-perkataan 'any proceedings' di dalam s 35 Akta patut diberi maksud biasa yang merangkumi kesemua prosiding di bawah Akta. Untuk menyatakan prosiding di bawah s 32(3) Akta bukan prosiding yang dibayangkan di bawah s 35 Akta akan menjadi pencabulan jelas perkataan s 35 Akta. Oleh itu dalam kes ini, s 35 meletakkan ke atas perayu-perayu beban untuk membuktikan bahawa milikan-milikan yang dirampas oleh polis bukan milikan haram (lihat perenggan 14–15 & 21).

(2) Selepas meneliti rekod-rekod mahkamah ini mendapati bahawa tidak terdapat keterangan yang boleh dipercayai untuk menyokong tuntutan perayu-perayu. Oleh itu, anggapan-anggapan kekal tidak dipatahkan dan seperti yang didapati oleh Mahkamah Tinggi milikan-milikan dianggap haram dan telah secara betul dirampas oleh Kerajaan Malaysia (lihat perenggan 22–23).]

Notes

For cases of search in general, see 5(2) *Mallal's Digest* (4th Ed 2010 reissue) paras 3429–3444.

Cases referred to

Hong Leong Bank Bhd v PP [2009] 3 MLJ 546; [2009] 8 CLJ 463, HC (refd)
Kii Sie Hoong v PP [2007] MLJU 567; [2008] 1 CLJ 683, HC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
Public Finance Bhd v PP [1999] 4 MLJ 143; [1999] 8 CLJ 485, HC (refd)
PP v Jessie Tan Poh Yoke [2008] MLJU 910, HC (refd)
PP lwn Lee Kee Sena & Anor [2005] 7 MLJ 336; [2005] 3 CLJ 649, HC (refd)
PP v Tan Lee Koh [1998] 2 MLJ 65; [1998] 2 CLJ 286, CA (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), 6(1)
Dangerous Drugs (Forfeiture of Property) Act 1988 ss 25, 25(1), 32, 32(2), (3), 34, 35
Evidence Act 1950 s 101

Appeal from: Criminal Appeal No 42–45 of 2010 (High Court, Kuala Lumpur)

Tina Ong (Sivanatham) for the appelant.
Asmah bt Musa (Attorney General's Chambers) for the respondent.

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the High Court in affirming the forfeiture of certain properties by the sessions court under s 32 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act'). The properties were seized by the police pursuant to s 25(1) of the Act.

[2] We heard the appeal on 22 September 2011. After hearing the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.

FACTS

[3] Briefly, the facts leading to this appeal are as follows. The first appellant was arrested under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 and subsequently detained under s 6(1) of the same Act. An investigation carried out by the police led to the seizure of certain properties belonging to the first appellant as well as the second appellant.

[4] On 17 September 2007 and on 25 September 2007, the second appellant and first appellant respectively applied for the release of the properties seized by the police. The applications were made in pursuant to s 32(2) of the Act.

[5] By a letter dated 7 November 2007, the deputy public prosecutor referred the claims to the sessions court for its decision pursuant to s 32(2) of the Act. The first appellant claimed the followings:

(a) cash amounting to RM423,654;

(b) one gold necklace, one gold bracelet and one gold ring;

(c) two units of laptop; and

(d) RM221,256.06 in his saving account with Maybank.

[6] The second appellant on his part claimed for the release of money amounting to RM104,272.60 kept in the CIMB Account No 0506-0155257-52-8.

[7] On 5 April 2010, after hearing all the parties, the sessions court judge forfeited all the properties. Dissatisfied with the decision, the appellants appealed to the High Court.

[8] The learned High Court judge allowed the appeal in part. The jeweleries and personal belongings of the first appellant were ordered to be returned to him. However, the cash amounting to RM423,654 and the money kept by the first appellant with Maybank as well as money kept by the second appellant with CIMB were ordered to be forfeited.

[9] The learned High Court judge held that the statutory presumption under s 35 of the Act places the burden on the appellants to prove that the properties were legally acquired and they had failed to do so. The High Court was of the view that the presumption under s 35 is applicable to s 32(3) of the Act.

SUBMISSIONS

[10] The main issue argued before us was whether the presumption under s 35 of the Act is applicable to under s 32(2) of the Act.

[11] Learned counsel for the appellants submitted that the learned High Court judge was wrong in law when he applied the presumption under s 35 of the Act that the properties is presumed to be illegal. He contended that the correct test is as stated in the s 32 of the Act and that the appellants only have to fulfill the test ie that the property was legally acquired and that there was no offence committed. He further contended that there is no mention of presumption under s 32 of the Act. Thus, he submitted that had the High Court accepted both the appellants' versions that the monies were acquired by them through the internet football betting and friendly loan activities, the properties should rightly therefore be returned to the appellants.

[12] The learned deputy public prosecutor submitted otherwise. He submitted that the test adopted by both the trial judge and the High Court judge was the correct approach. He submitted that the wording in s 35 is so plain and obvious that it covers any proceeding under the Act and therefore the presumption of illegal property under s 35 is applicable to s 32 of the Act.

DECISION

[13] Before going any further, it is necessary to examine both s 32 and s 35 of the Act, which we now reproduced:

32 Forfeiture of property seized under this Act where there is no prosecution, or no proceedings under Part III or no claim thereto

(1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and —

(a) no prosecution for any offence under any law is instituted with regard to such property;

(b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and

(c) no claim in writing is made by any person that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952, within

(2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any person in the terms mentioned in paragraph (c) of subsection (1), the Public Prosecutor shall within fourteen days after the expiry of the said period of three months, refer such claim to a Sessions Court for its decision.

(3) The Sessions Court to which a claim is referred under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the Court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited.

(4) The provisions of this section shall be without prejudice to the power of a police officer to release from seizure any property under section 31.

(5) Where property has been forfeited under subsection (1), it shall not be a bar to any prosecution for an offence under any law being instituted in respect of such property at any time thereafter.

35 Presumption as to liable person and illegal property

> Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the Court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

[14] The working of s 32 of the Act is well illustrated by Shaikh Daud JCA (as he then was) speaking for the Court of Appeal in *Public Prosecutor v Tan Lee Koh* [1998] 2 MLJ 65; [1998] 2 CLJ 286, which reads as follows:

> … As for s 32 of the Act, it applies to any property seized, such as under s 25 of the Act. The seizure in the present case is under s 25 of the Act. Having seized such properties, and if no prosecution is instituted (s 32(1)(a)) or if no proceedings commenced by the public prosecutor, such as under s 8 (s 32(1)(b)) and no claim is made by anyone within a period of three months, (s 32(1)(c)) then the seized property or properties stands forfeited after the expiration of the said three months.
>
> If within the three months from the date of the seizure, a claim in writing is made by anyone as in the case in the present appeal, the Public Prosecutor is required within fourteen days after the expiry of the three months, to refer such claim to the sessions court for its decision (s 32(2)). Unlike the provisions under s 8, no application need be made by anyone in the sessions court, nor is the sessions court required to be satisfied that any provisions has been complied with except perhaps that the claim is made in writing within three months from the date of the seizure. Upon being referred to under s 32(2), then pursuant to s 32(3), the sessions court is required to issue a summons to the person claiming and shall proceed to the examination of the matter. From this it can be seen that the law does not place the burden on the public prosecutor to satisfy the court that the seizure was proper, or that the property ought to be forfeited, on the contrary the law places a burden on the person who made the claim to answer the summons.
>
> *Section 32(3) places the burden upon the person making the claim 'upon proof that he is lawfully entitled thereto'.* Section 32, therefore, places no burden on the public prosecutor to proof anything. It merely places the burden to refer the claim to the sessions court. Therefore, under s 32, the role of the public prosecutor is merely to forward the claim and as has been well put by the deputy public prosecutor, the role of the public prosecutor is that of a 'forwarding agent'. In fact, the procedure both in s 8 and in s 32 is consistent with s 101 of the Evidence Act 1950, which provides that the burden of proof is on the person who asserts a thing. Under s 8 since it is the public prosecutor who asserts that the property ought to be forfeited, the burden is therefore, on him, *whereas under s 32 the burden would be on the claimant who asserts that he is lawfully entitled to the property.*

[15] We share the same view as to the interpretation of s 32. Clearly s 32(3) by itself places the burden upon the person making the claim to prove that he is lawfully entitled to the property. However, the issue posed to us is not on the

working of s 32 of the Act but whether 'the presumption as to liable person and illegal property' under s 35 of the Act is applicable to a proceeding under s 32 of the Act.

[16] At the High Court level, there have been a number of cases which held that s 35 of the Act is applicable to proceeding under s 32 of the Act. Nik Hashim J (as he then was) in *Public Finance Bhd v Public Prosecutor* [1994] 4 MLJ 143; [1999] 8 CLJ 485 had observed:

> Section 35 is clear in its provisions. Thus, with respect, I do not agree with counsel contention that the presumption is not applicable to the appellant. Besides Azlin, the appellant was also a person 'proceeded against' in the claim proceeding, for the proceeding under s 32(3) is a proceeding within the meaning of 'any proceedings' in respect of any illegal property under s 35 of the Act. Thus in this case, the presumption is equally applicable to the appellant.

[17] In *Kii Sie Hoong v Public Prosecutor* [2007] MLJU 567; [2008] 1 CLJ 683 Sangau Gunting J, speaking on the same subject said:

> It must be pointed out as rather blurry the issue of whether 'the presumption of liable persons' is applicable or otherwise to a proceeding under s 32 of Part IV in view of the definition of a 'liable person' being confined to proceedings under Part III only. But that would perhaps be delving into 'ambiguities … infirmities of language … other defects or deficiencies …' in the provisions of the Act, which by virtue of s 34 of the same Act should be disregarded so that any construction and interpretation thereof would 'give effect to the purposes of this Act …'

[18] In *Public Prosecutor v Jessie Tan Poh Yoke* [2008] MLJU 910 Apandi Ali J (as he then was) in dealing with the same subject said:

> The proceedings undertaken by the sessions court under s 32(3) of the Act, is governed by special provisions in respect of evidence and procedure, namely under part VI of the Act. One of the special provision is the provision in respect of the presumption as to 'liable person' and 'illegal property' under s 35 of the Act.
>
> Applying to presumption under s 35 which is to be read together with s 32(3) of the Act, it is clear that the onus or burden of proof lies with the claimant. In other words the law shifted the burden upon the claimant'.

[19] In *Public Prosecutor lwn Lee Kee Sena & Satu Lagi* [2005] 7 MLJ 336; [2005] 3 CLJ 649 Zabidin J also dealing on the same subject had this to say:

> Seksyen 35 Akta dengan jelas memperuntukkan:
>
> Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or such property is illegal property, the court shall presume that person to be a liable person and that

property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the public prosecutor shall have the right to rebut the same.

Dengan lain perkataan hakim mahkamah sesyen perlu memulakan kes ini dengan menganggap bahawa Lee Kah Seng dan Loh Kah Hock sebagai *liable person* dan kereta PDR 2837 sebagai *illegal property*. Terpulang kepada pemohon/responden untuk membuktikan sebaliknya. Jika ini gagal dilakukan maka hakim mahkamah sesyen mempunyai tanggungjawab untuk memerintahkan kenderaan tersebut dilucut hak kepada Kerajaan Malaysia.

[20] The only case in the High Court that had ruled that s 35 is inapplicable to a proceeding under s 32(3) is *Hong Leong Bank Bhd v Public Prosecutor* [2009] 3 MLJ 546; [2009] 8 CLJ 463. In that case, Lim Yee Lan J held that s 35 did not apply to a proceeding under s 32 of the Act. She gave her reasons as follows:

A literal reading of s 35 shows that it is intended to apply to a proceeding which is brought under this Act against any person or in respect of any property on the ground that such person is a liable person or such property is illegal property, which, based on the foregoing discussions, can only refer to a proceeding under Part III of the Act and not otherwise. In other words, the presumption under s 35 would apply to the hirer had proceedings under Part III of the Act been taken against him by the PP on the basis of him being a liable person and the said vehicle an illegal property.

It is also my view that had s 35 been intended to apply to all proceedings, including a claim made under s 32(1). under the Act it would have used words to such effect as 'In all proceedings under this Act' minus those qualifying words in italics.

My view is also fortified by the heading in s 32 of the Act which states that it applies to 'forfeiture of properly seized under the Act where there is no prosecution, or no proceedings under Part III or no claim thereto'.

Thus, while an inquiry under s 32 is a proceeding under the Act, it is however not a proceeding brought by the PP against any person on the ground that he is a liable person or on the ground that the property is illegal property.

Consequently, a proceeding under s 32(3) of the Act is not a proceeding that is envisaged under s 35 of the Act and hence the presumptions therein that the court shall presume a person to be a liable person and a property to be an illegal property does not apply to a proceeding under s 32 of the Act. It is to be emphasized that the Court of Appeal in *Public Prosecutor v Tan Lee Kok* did not touch at all on the relationship between s 32 and s 35 of the Act, its focus being more on the difference in the procedures between ss 8 and 32 proceeding under the Act.

[21] With respect, we are more incline to agree with the majority of the High Court judges which have held that the presumption under s 35 of the Act is applicable to a proceeding under s 32 of the Act. We share the view that s 35

was intended to apply to all proceedings under the Act. The wordings in s 35 are very clear. It uses the words 'any proceeding'. The words 'any proceedings' should and must be given the ordinary meaning that it covers all proceedings under the Act. To say that a proceeding under s 32(3) of the Act is not a proceeding that is envisaged under s 35 of the Act and would not be in tandem with the intention of law makers and would be in violation to the clear wordings of s 35 of the Act.

[22] Thus in the instance case, the appellants are claiming for the return of the properties seized by the police pursuant to s 25(1) of the Act. Section 35 of the Act places upon the appellants to prove by admissible evidence that the properties are not illegal properties. It places no burden on the public prosecutor to prove anything. The burden has shifted to the appellants. And on the facts of this case, the appellant had failed to prove that the properties are not illegal properties. It was their contention that the properties were acquired through internet football betting and friendly loan activities. But both the sessions court and the High Court found such claims were not supported by evidence. We have perused through the records and we have found that there is no credible evidence to back the appellant's claim. Thus, we have no reason to differ from the findings of the courts below. The presumption thus remains unrebutted and the properties are presumed to be illegal and therefore it has been rightly forfeited to the Government of Malaysia.

[23] The provisions under s 35 may be harsh or unjust. In this respect, we only need to quote the wise words of Raja Azlan Shah FCJ (as his Royal Highness then was) speaking on the 'harsh and unjust law' in the case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187:

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 118:
>
> Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.
>
> It is the province of the courts to expound the law and 'the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction' — per Roskill LJ in *Henry v Geopresco International*

Ltd [1975] 2 All ER 702 718. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the Legislature and not the courts; they have their remedy at the ballot box.

[24] Accordingly, the appeal is dismissed. We affirm the orders made by the High Court.

Appeal dismissed.

Reported by Kohila Nesan